U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

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Issue Date: 21 August 2006

In the Matters of:

SPRINT UNITED MANAGEMENT COMPANY,
Employer

on behalf of

JAYACHANDRA KADIAM, **BALCA No.: 2006-INA-00006**
ETA Case No.: P2002-KS-05416184

SURYANARAYANAN RAMAMURTHY, **BALCA No.: 2006-INA-00007**
ETA Case No.: P2003-KS-05417535

GIRISH PRABHAKAR JOSHI, **BALCA No.: 2006-INA-00008**
ETA Case No.: P2003-KS-05419439

XIANGHONG ZENG, **BALCA No.: 2006-INA-00010**
ETA Case No.: P2003-KS-05417536

NANDANA THILAKASIRI, MADDUMAKUMARA **BALCA No.: 2006-INA-00011**
ETA Case No.: P2002-KS-05416558

and

PAVAN KUMAR CHERVELA, **BALCA No.: 2006-INA-00012**
ETA Case No.: P2002-KS-05416054

Aliens.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Michael K. Ungar, Esquire
San Francisco, California
For the Employer and the Alien

Roger K. McCrummen, Esquire
Kansas City, Missouri
For the Employer and the Alien

Judy Bordeau, Esquire
Mission, Kansas
For the Employer and the Alien

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

These matters are appeals of denials of applications for alien labor certification by a federal Certifying Officer (CO). Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations (C.F.R.).[1] Because of the similarity of the facts and issues raised, these cases have been consolidated for decision. *See* 29 C.F.R. § 18.11.

STATEMENT OF THE CASE

These cases involve applications for alien labor certification for the positions of Network Systems Engineer and Software Engineer. In these cases, the Employer applied for a Reduction in Recruitment (RIR). The CO granted the RIR request in each of the cases, but denied the labor certification applications because the Employer had not adequately demonstrated that layoffs by the company had not adversely impacted U.S. workers. The CO concluded that there was not a bona fide job opportunity. Rather than remanding the application to the State Workforce Agency (SWA) for additional recruitment under the basic recruitment scheme, the CO issued a Final

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

Determination denying the application due to the Employer's inability to meet the requirements of 20 C.F.R. §656, as well as the CO's determination that there were U.S. workers willing, able, and qualified for the job.

The Employer challenges the CO's denial of certification essentially on two grounds. First, the Employer takes issue with the timing of the recruitment effort imposed by the CO. The Employer argues that a recruitment obligation nearly three years after the filing of a RIR request amounts to an unreasonable requirement, one not imposed on employers proceeding through the basic recruitment scheme. Second, the Employer contends that an approval of an RIR request and a simultaneous rejection of an application based on the lack of a bona fide job opportunity are inconsistent and inherently contradictory. The Employer maintains that any findings regarding the availability of U.S. workers, even if appropriate and within the permissible authority of the CO, should result in a remand to the SWA for additional recruitment, not an outright denial of the application. *See Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003); Motorola, Inc., 2003-INA-290 (June 8, 2004); and *Sun Microsystems, Inc.*, 2003-INA-302 (Mar. 12, 2004), *modified on reconsideration* (June 2, 2004).

DISCUSSION

CO's Authority to Consider Layoffs Near to Date of NOF

This panel has previously addressed the contention that a CO acts improperly in considering an employer's layoffs near to the time that a Notice of Findings was issued rather than when the application was filed. In *Solectron Corp.*, 2003-INA-00144 (Aug. 12, 2004), we held that while the regulations require an employer to document its efforts for the six months prior to the filing of the application when requesting an RIR, the regulations do not limit the CO's discretion when considering whether to grant an RIR request. The panel stated that

> It is unfortunate that RIR applications may be subject to changes in the job market occurring during SWA and DOL processing, but it cannot be said that the CO acts unreasonably in using his or her discretion to look more closely at RIR requests when there are layoffs in the industry close to the time that the RIR is first looked at by the CO.

Id. Thus, we find that the CO properly considered company layoffs in regard to whether certification could be granted based on the Employer's pre-application recruitment efforts. We also find for the reasons stated below, however, that the CO erred in denying certification outright rather than referring the matters for supervised recruitment.

CO's Grant of RIR, But Denial of Certification Based on Layoffs

This panel has held that when the CO denies an RIR request, such a denial normally should result in the remand of the application to the local job service or SWA for regular processing. *See Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003). The instant cases are distinguishable because here the CO granted the RIRs.

In a similar set of cases decided recently by this panel, we held:

> [W]hen a CO approves an RIR request, the CO cannot then deny the application outright based on deficiencies in the recruitment. In other words, in such a situation the CO did not actually grant a complete reduction in recruitment. When an RIR request is approved, any additional recruitment requirements imposed on the employer or denial of the application based on deficiencies in recruitment constructively operate to classify the CO's approval of the RIR as only a partial reduction in recruitment. In effect, the CO is implying that the Employer has failed to demonstrate that it has completely and fully tested the labor market -- that the Employer has only partially satisfied the recruitment requirements. Under the regulation at 20 C.F.R. §656.21(h)(5), the granting of a partial RIR mandates a return of the application to the local job service or SWA. Accordingly, we hold that the CO's outright denial of the applications and failure to refer the matters for supervised recruitment was an error.

Oracle USA Inc., 2006-INA-26, 29 to 33 (Aug. 21, 2006), slip op. at 5-6 (footnotes omitted).

The same principle applies to the instant appeals. Thus, for the same reasons stated in *Oracle USA Inc.*, the Certifying Officer's denials of labor certification in the above matters are

hereby **VACATED** and the matters **REMANDED** to the CO for regular labor certification processing.[2]

SO ORDERED

For the panel:

A

JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting

[2] In Case No. 2006-INA-6, the Final Determination was based on the Employer's failure to file a timely rebuttal to a second NOF. On appeal, the Employer provided documentation indicating that it had timely requested an extension of time to respond to the second NOF and that if the extension had been granted, the rebuttal would have been timely. The CO, however, never ruled on the motion. The Employer argues that the CO was obliged under the procedures stated in General Administration Letter (GAL) 1-97 to grant the extension. GAL 1-97 paragraph B.3. does in fact provide instructions to CO to grant employers one extension of time to respond to a NOF. *See* GAL 01-97 (Oct. 1, 1996), available at wdr.doleta.gov/directives/attach/GAL1-97_attach.pdf. Given that GAL 1-97 suggests an entitlement to a single extension of time, that the CO never ruled on the motion, that this is only one of a group of very similar applications that were pending at the time, that the Employer did request a *Compaq Computer* remand in its motion for an extension of time (*see* Appeal File at 10 in Case No. 2006-INA-6), and that the CO has not briefed the timeliness of the rebuttal issue on appeal, we decline to affirm the denial on timeliness grounds and include this application in the remanded cases. This ruling is limited to the particular circumstances of this case. Employers operate at their peril if they merely assume that they will be granted an extension of time to file a rebuttal. *Compare Mr. & Mrs. Walter Morgan*, 1988-INA-446 (Feb. 22, 1990) (when the due date for rebuttal arrives, it is the employer's burden to inquire as to the status of an outstanding request extension); *Barrister's Associates, Inc.*,1989-INA-117 (Feb. 12, 1990) (CO cannot lead the employer to believe that he or she is amenable to leaving the case open for completion of re-recruitment and then deny certification when the employer inquires into the status of the case); *Modgraph, Inc.*, 1988-INA-287 (Dec. 29, 1988) (*en banc*) (where the CO may have informally granted an extension of time to file a rebuttal and the employer was relying on that informal extension in good faith, the case may be remanded for a determination of whether such an extension had been granted).

full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.